

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RONALD W. CARLSON and U.S. POSTAL SERVICE,  
POST OFFICE, Salt Lake City, Utah

*Docket No. 97-1605; Submitted on the Record;  
Issued April 5, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for merit review under section 8128(a).

In the present case, appellant filed a claim on December 22, 1993 alleging that continual walking on concrete in the performance of duty had contributed to a right foot stress fracture, left leg vein thromboses, aggravation of lupus and a stroke on November 13, 1993. The Office accepted the claim for a stress fracture of the third metatarsal in the right foot.

By decision dated December 12, 1994, the Office determined that the accepted condition had resolved by January 27, 1994. The Office also determined that the conditions of left leg phlebitis, systematic lupus and a cerebrovascular accident in 1993 were not causally related to employment. Appellant requested a hearing before an Office hearing representative, which was held on August 3, 1995. At that hearing appellant indicated that he was expanding his claim to allege other employment factors that caused him stress and contributed to cerebrovascular accidents.

In a decision dated October 12, 1995, the hearing representative affirmed the December 12, 1994 Office decision. The hearing representative found that appellant had not established that a deep vein thrombosis or any cerebrovascular accidents were causally related to walking on concrete in the performance of duty. With respect to the additional allegations of other employment factors contributing to emotional stress and consequential cerebrovascular accidents, the hearing representative directed the Office to develop and adjudicate this expanded claim.

On January 22, 1996 appellant filed an appeal with the Board for review of the October 12, 1995 decision.<sup>1</sup> By order dated November 13, 1996, the Board dismissed the appeal

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<sup>1</sup> The appeal was docketed as No. 96-860.

pursuant to appellant's request to withdraw the appeal and submit additional evidence through a request for reconsideration. Appellant requested reconsideration and submitted documents relating to his Equal Opportunity Employment Commission (EEOC) claim.

In a decision dated December 20, 1996, the Office determined that the evidence submitted was irrelevant and insufficient to warrant reopening the claim for merit review.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.<sup>2</sup> Since appellant filed his appeal on March 24, 1997, the only decision over which the Board has jurisdiction on this appeal is the December 20, 1996 decision denying his request for reconsideration.

The Board finds that the Office properly refused to reopen the case for merit review under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.<sup>5</sup>

In this case the October 12, 1995 and December 12, 1994 Office decisions were limited to the employment factor of walking on concrete. The issue of whether appellant had any additional conditions causally related to this employment factor is a medical issue that must be resolved by the submission of probative medical evidence. The transcripts of EEOC hearings do not constitute probative medical evidence. The Board notes that there is a medical report included in the EEOC documents submitted by appellant which appears to be new medical evidence. In a report dated May 6, 1994, Dr. Andrew Fisher, a psychiatrist, stated that appellant had medical and emotional problems that made it important for him to work during regular daytime hours. Dr. Fisher did not discuss the relevant issue of whether appellant had a condition causally related to walking on concrete during his federal employment. The May 6, 1994 report is therefore not considered relevant and pertinent evidence which would require the Office to reopen the claim. Appellant did not meet any of the requirements of section 10.138(b)(1), and therefore his request for reconsideration was not sufficient to reopen the claim for merit review.

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<sup>2</sup> 20 C.F.R. § 501.3(d).

<sup>3</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

The Board notes, however, that the hearing representative had directed the Office to further develop the claim with regard to the additional allegations of other employment factors contributing to a mental or physical condition. There is no indication in the case record submitted to the Board that the Office has undertaken any additional development on this issue. Upon return of the case record, the Office should develop the record and issue a decision regarding appellant's additional claims.

The decision of the Office of Workers' Compensation Programs dated December 20, 1996 is affirmed.

Dated, Washington, D.C.

April 5, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member